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#### UNITED STATES OF AMERICA

#### Before the

#### SECURITIES AND EXCHANGE COMMISSION



AD	MIN	ISTRA	ATIVE	<b>PRO</b>	CEED	ING
File	No.	3-1551	4			

In the Matter of

DONALD J. ANTHONY, JR.,
FRANK H. CHIAPPONE,
RICHARD D. FELDMANN,
WILLIAM P. GAMELLO,
ANDREW G. GUZZETTI,
WILLIAM F. LEX,
THOMAS E. LIVINGSTON,
BRIAN T. MAYER,
PHILIP S. RABINOVICH, and
RYAN C. ROGERS.

# RESPONDENT, WILLIAM F. LEX'S MOTION TO CORRECT MANIFEST ERRORS OF FACT

Respondent, William F. Lex, hereby files this Motion to Correct Manifest Errors of Fact pursuant to Commission Rule of Practice 111, 17 C.F.R. § 201.111(h), and in support thereof avers as follows:

Chief Administrative Law Judge Benda Murray issued an Initial Decision dated
 February 25, 2015 in the above-captioned matter.

<sup>&</sup>lt;sup>1</sup> Mr. Lex does not agree that *any* amount of disgorgement, fine or other sanction is warranted in this case. His challenge to those conclusions, among others, will be the subject of a forthcoming Petition for Review to the Commission. He expressly reserves all of his rights in that regard.

- 2. The Initial Decision imposes sanctions against Respondent Lex and seven other Respondents for violations of the federal securities laws arising from their sale of certain securities, including sales of notes in the so-called "Four Funds."
- 3. The Initial Decision includes two manifest errors of fact, each of which is discussed below.

#### Manifest error in calculation of disgorgement amount

- 4. In her Initial Decision dated February 25, 2015, Judge Murray determined that the selling Respondents, except Gamello, should disgorge the commissions earned on sales made after February 1, 2008, because she found that by at least February 1, 2008, the Respondents had the requisite scienter to violate the antifraud provisions of the federal securities laws. (Initial Decision at 115.)
  - 5. The Initial Decision states as follows:

I find that all Selling Respondents, except Gamello, had requisite scienter to violate the antifraud provisions by at least February 1, 2008. This date is almost a month after Selling Respondents learned about the Four Funds' junior note default and that Smith had misled them regarding the Four Funds' diversification, investments in alseT, and conflicts. Selling Respondents, except Gamello, are ordered to disgorge all commissions earned on sales after that date, in the following amounts.

(Initial Decision at 115, emphasis added.)

- 6. The Judge determined that Mr. Lex earned commissions on sales after February 1, 2008 in the amount of \$335,066, and she ordered him to disgorge commissions in that amount. (Id. at 115, 117.)
- 7. The Judge's calculation of \$335,066 was based on Exhibit 41 to Division Exhibit 2, which lists the commissions paid to Mr. Lex and the dates of each payment. (See Exhibit

- "A.") The calculation is erroneous because the Division's own evidence reveals that the \$335,066 in commissions paid to Mr. Lex after February 1, 2008 includes \$165,691 for sales that were made before February 1, 2008.
- 8. Exhibit 4l to Division Exhibit 2, which lists the payments of commissions to Mr. Lex, reflects that he received 19 payments in commissions after February 1, 2008 for sales of the so-called Four Funds--FAIN, TAIN, FIIN and FEIN, and that those 19 payments totaled \$167,451. (See Exhibit "A.") For convenience, the 19 entries that comprise that \$167,451 total are circled on the attached Exhibit "B."
- 9. But Exhibit 4k to Division Exhibit 2, which lists Mr. Lex's sales, reflects that Mr. Lex made only six sales of Four Funds notes after February 1, 2008. (See Exhibit "C.") For convenience, those six post-February 1, 2008 sales are circled on the attached Exhibit "D."
- 10. The Division's evidence establishes that the amounts of those six post-February 1, 2008 Four Funds sales totaled \$220,000. (See Exhibit "C" and "D.")
- 11. It is undisputed that Mr. Lex's commissions on these Four Funds sales was .8%. (Exhibit "E," tr. 4866.)<sup>2</sup>
- 12. .8% of \$220,000 is \$1760. Therefore, by the Division's own evidence, Mr. Lex received only \$1760 in commissions for post-February 1, 2008 sales of the Four Funds, rather than \$167,451. The difference between those two figures, which is \$165,691, consists of

Mr. Lex never sold junior notes, only senior and senior subordinated. (Exhibit "E," tr. 4865.) His commission on senior notes was .8% (id. at 4866), and the Division's list of his sales reflects that all six of his post-February 1, 2008 Four Funds sales were senior notes. The list shows that all six of those post-February 1, 2008 notes paid 7% interest (see Exhibits "C" and "D"), and the senior subordinated notes always paid more than 7% interest. (See Division Exhibit 5, private placement memorandum for FIIN; Division Exhibit 6, private placement memorandum for FAIN; Division Exhibit 12, private placement memorandum for FAIN.) In any event, even if all of the post-February 1, 2008 Four Funds sales had been senior subordinated notes, which they were not, Mr. Lex's commissions would have been 1.6% of \$220,000 rather than .8% of \$220,000, because his commission on senior subordinated notes was 1.6%. (Exhibit "E" at 4867-4768.) 1.6% of \$220,000 is \$3520 rather than \$1760. Using the higher figure of \$3520, the revised figure for disgorgement would be, at most, \$171,135 rather than \$169,375.

commission payments made to Mr. Lex after February 1, 2008 for sales made before February 1, 2008. It follows that, by the Judge's own findings, \$165,691 should be deducted from the \$335,066 disgorgement award against Mr. Lex.

- 13. Subtracting \$165,691 from the \$335,066 disgorgement award results in a revised disgorgement figure of \$169,375.
- 14. The revised figure for disgorgement will have a corresponding effect on the amount of interest.

### Manifest error regarding the content of the Chang arbitration award

- 15. The Initial Decision states that the <u>Chang</u> arbitration panel "derided Lex for failing to diversify Chang's holdings." (Initial Decision at 37.)
- 16. To "deride" means: "Laugh contemptuously or scornfully at; treat with scorn; mock." The New Shorter Oxford English Dictionary, v. 1, p. 641 (1993). "Scorn" in turn means: "show extreme contempt for, mock, deride. Hold in disdain or strong contempt, despise." Id., v. 2, p. 2723. And "mock" means "mimic contemptuously." Id., v. 1, p. 1801.
- 17. To characterize the <u>Chang</u> arbitration panel as "deriding" Mr. Lex for failing to diversify Chang's holdings, or for anything else, is a manifest error of fact. To the contrary, the panel characterized Mr. Lex as a "conscientious broker and insurance salesman..." (<u>Chang</u> arbitration award, Exhibit "F" [Div. Ex. 514] at 3.)
- 18. With respect to allegations in <u>Chang</u> that are relevant to this case, the <u>Chang</u> panel found as follows:

Dr. Chang and Kee Mann Chang are found to be responsible for the consequences of their own investment decisions after their stating repeatedly verbally and in writing that they had the opportunity to read investment literature and query resources such as Mr. Lex about the risks and rewards of the subject private placement notes.

(<u>Id</u>.)

- 19. Nowhere is the <u>Chang</u> opinion "contemptuous" of Mr. Lex. The arbitrators found against Mr. Lex not because he pushed Chang into insufficiently diversified investments, but merely because Mr. Lex processed the purchase orders that Chang freely made on his own, with full knowledge of all the risks. (<u>Id</u>. at 3-4.)
- 20. The <u>Chang</u> arbitrators did not "deride" Mr. Lex, and the statement that they did so is a manifest error of fact.
- 21. Commission Rule of Practice 111 authorizes the filing of a "motion to correct a manifest error of fact in the initial decision." 17 C.F.R. § 201.111(h).
- 22. For the foregoing reasons, Respondent, William F. Lex, requests that this Motion to Correct Manifest Errors of Fact be granted and that the Initial Decision be amended to correct the errors set forth above.

WHEREFORE, Respondent, William F. Lex, respectfully requests that this Motion be granted and that Initial Decision be amended to correct the errors set forth above.

GILBERT B. ABRAMSON & ASSOCIATES, LLC

BY: Hilbert B. Abramson

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Attorneys for Respondent
William F. Lex

DATE: 3-6-15

EXHIBIT "A"

Date		Description per Payroll Records		690 LEX
	10/31/2003	NP/CCC/McGinn Smith	ć	3,120
		NP/CCC/McGinn Smith	\$ e	35,304
		NP/CCC/McGinn Smith	ې د	9,096
		NP/CCC/McGinn Smith	* * * * * * * * * * * * * * * * * *	18,600
		NP/CCC/McGinn Smith	ć	17,000
		NP/CCC/McGinn Smith	ċ	7,680
	•	NP/CCC/McGinn Smith	ب خ	7,080 3,920
		NP/CCC/McGinn Smith	ې د	10,240
		NP/CCC/McGinn Smith	ç	4,440
	• •	NP/CCC/McGinn Smith	ې د	1,280
		NP/CCC/McGinn Smith	ې د	50,040
		NP/CCC/McGinn Smith	ب خ	39,160
		NP/CCC/McGinn Smith	ç	43,965
		NP/CCC/McGinn Smith	ç	90,492
		NP/CCC/McGinn Smith	ې خ	2,320
	• •	·	ې خ	2,320 3,480
		NP/CCC/McGinn Smith	ې خ	· ·
		NP/CCC/McGinn Smith	÷	10,400
		NP/CCC/McGinn Smith	خ	10,640
		NP/CCC/McGinn Smith	\$ \$ \$	11,908
		NP/CCC/McGinn Smith	٠ ج	9,568 1,760
		Net Proprietary	Ş	1,760
		Net Proprietary	÷	1,520
	• •	Net Proprietary	<b>\$</b>	188,976
		Net Proprietary	<b>\$</b>	10,384
	• •	Net FEIN 2nd Comm	\$ \$ \$ \$ \$ \$ \$ \$ \$	77,540
		Net Proprietary	<b>&gt;</b>	11,760
	• •	Net Private	<b>&gt;</b>	3,874
	• •	Net Private (FAIN)	<b>\$</b>	8,939
	• •	Net Private (FAIN)	\$ \$	1,240
		Net Private (FAIN)	\$ \$	13,600
	• •	FAIN AND FEIN		6,720
	8/15/2006		\$	4,560
	9/15/2006		\$	7,640
	10/15/2006		\$	4,480
	11/15/2006		\$	1,400
	• •	Net Private (FAIN)	\$	1,050
		Net Annual Commissions	\$	84,640
	• •	Net Annual Commissions (FIIN AND TAIN)	\$	189,223
		Net Private	\$	120
		Net Annual FEIN	\$	79,910
		Net Private (FAIN)	\$	4,240
		NET PRIVATE LINE ITEM	\$	8,880
		NET PRIVATE LINE ITEM	\$	4,920
	7/15/2007		\$	1,900
		Net Private (TDMVER)	\$	2,100
	8/15/2007		\$ \$	6,200
	9/15/2007			2,900
	11/15/2007	Firstline, TDML, CMSF 80%	\$	2,500

Date		Description per Payroll Records		690 LEX
	11/15/2007	Firstline 90%	\$	8,100
	12/15/2007	Firstline 90%		25,110
	12/15/2007	2007 Annual FAIN	Ś	96,104
	1/15/2008	TDM Verifier 75%	\$	4,781
	1/15/2008	Firstline 90%	Ś	7,290
	1/15/2008	2008 Annual TAIN & FIIN	\$	183,463
	2/15/2008	TDM Verifier 75%	Ś	12,788
	2/15/2008	Firstline 90%	\$	8,100
	2/15/2008	2008 Annual FEIN,tain & fiin	\$	89,055
	3/15/2008	TDM Verifier 75%	\$	9,281
	3/15/2008	Firstline, TDML, CMSF 80%	\$	4,900
		Firstline 90%	\$	1,215
	4/15/2008	TDM 75%	\$	4,013
	4/15/2008	Firstline, TDM, CMSF 80%	\$	5,900
	5/15/2008		\$	844
	• •	Firstline, TDM, CMSF 80%	\$	2,150
		Firstline 90%	\$	540
		Firstline 90% (INEX)	\$	20,655
	•	Firstline 90% (INEX)	\$	8,303
	10/15/2008	· · · ·	\$	16,200
	11/15/2008		\$	1,800
		Net Private (TDMVER)	\$	1,520
	1/15/2009		\$	2,898
	1/15/2009		\$	4,112
	2/15/2009		***********	2,898
	2/15/2009		\$	4,112
	• •	Net Private (TDMM Cable 09)	\$	5,761
		FIRSTLINE, TDM, CMSF (ALL VERIFIER)	\$	9,840
	• •	Firstline, TDM, CMSF 80% (TDMV07R9% AND TDMMCAB09-9%)	\$	8,904
	3/15/2009		\$ \$ \$	2,898
	3/15/2009		\$	4,112
	4/15/2009		\$	2,898
	4/15/2009		\$	4,112
	• •	Net Private (TDM Cable and TDMV)	\$	1,470
	5/15/2009	•	\$	2,898
	5/15/2009		\$	4,112
		Net Private (TDMV07R07%)	\$	280
	6/15/2009		\$	2,898
	6/15/2009		\$	4,112
	• -	Net Private (TDMM Cable 09)	\$	6,800
	• •	2008 FAIN	\$	5,152
	• -	2008 TAIN	\$	7,310
	• •	Net Private (TDMM Cable 09)	\$	6,800
	8/15/2009		* * * * * * * * * * *	4,826
	• •	2008 TAIN	\$	7,111
	•	Net Private (TDMV08R)	\$	21,081
	9/15/2009	Net Private (TDMVER11-9.00)		8,470
	9/15/2009	2008 FAIN	\$	4,826

Date	Description per Payroll Records 9/15/2009 2008 TAIN	<b>690 LEX</b> \$ 7,111
TOTAL		<u>\$ 1,775,544</u>

EXHIBIT "B"

Date		Description per Payroll Records		690 LEX
	10/31/2003	NP/CCC/McGinn Smith	\$	3,120
	· · ·	NP/CCC/McGinn Smith	Ś	35,304
		NP/CCC/McGinn Smith	Ś	9,096
		NP/CCC/McGinn Smith	****************	18,600
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		NP/CCC/McGinn Smith	Š	7,680
		NP/CCC/McGinn Smith	Ś	3,920
		NP/CCC/McGinn Smith	Š	10,240
	• •	NP/CCC/McGinn Smith	Š	4,440
		NP/CCC/McGinn Smith	Ś	1,280
		NP/CCC/McGinn Smith	Ś	50,040
	• •	NP/CCC/McGinn Smith	Ś	39,160
	· ·	NP/CCC/McGinn Smith	Š	43,965
		NP/CCC/McGinn Smith	Š	90,492
		NP/CCC/McGinn Smith	Š	2,320
	• •	NP/CCC/McGinn Smith	Š	3,480
		NP/CCC/McGinn Smith	Ś	10,400
		NP/CCC/McGinn Smith	Ś	10,640
		NP/CCC/McGinn Smith	Ś	11,908
		NP/CCC/McGinn Smith	Ś	9,568
		Net Proprietary	Ś	1,760
		Net Proprietary	Ś	1,520
	• •	Net Proprietary	Ś	188,976
	• •	Net Proprietary	Ś	10,384
		Net FEIN 2nd Comm	Š	77,540
	• •	Net Proprietary	\$	11,760
	• •	Net Private	Ś	3,874
	• •	Net Private (FAIN)	Ś	8,939
	• •	Net Private (FAIN)	Ś	1,240
	• •	Net Private (FAIN)	Ś	13,600
	• •	FAIN AND FEIN	Ś	6,720
	8/15/2006		Š	4,560
	9/15/2006		\$	7,640
	10/15/2006		\$	4,480
	11/15/2006		Ś	1,400
		Net Private (FAIN)	\$	1,050
		Net Annual Commissions	\$	84,640
		Net Annual Commissions (FIIN AND TAIN)	Ś	189,223
		Net Private	\$	120
	• •	Net Annual FEIN	\$	79,910
		Net Private (FAIN)	\$	4,240
	• •	NET PRIVATE LINE ITEM	\$	8,880
		NET PRIVATE LINE ITEM	\$\$\$\$\$\$\$\$\$\$\$\$\$	4,920
	7/15/2007		\$	1,900
		Net Private (TDMVER)	\$	2,100
	8/15/2007		\$	6,200
	9/15/2007		\$	2,900
		Firstline, TDML, CMSF 80%	\$	2,500
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	Firstline 90% (INEX)	\$	8,303
10/15/2008	·	\$	16,200
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• •	2008 FAIN	\$	2,898
	2008 TAIN	\$	4,112
• •	2008 FAIN	\$ \$	2,898
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• •	Net Private (TDMM Cable 09)	\$	5,761
2/15/2009	FIRSTLINE, TDM, CMSF (ALL VERIFIER)	\$	9,840
	Firstline, TDM, CMSF 80% (TDMV07R9% AND TDMMCAB09-9%)	\$	8,904
	2008 FAIN	\$	(2,898)
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• •	2008 FAIN	\$	(2,898)
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• -	2008 FAIN	\$	2,898
	2008 TAIN	\$	(4,112)
	Net Private (TDMV07R07%)	\$	280
6/15/2009	2008 FAIN	\$	2,898
6/15/2009	2008 TAIN	\$	4,112
6/15/2009	Net Private (TDMM Cable 09)	\$	6,800
7/15/2009	2008 FAIN	\$	(5,152)
7/15/2009	2008 TAIN	\$	(7,310)
	Net Private (TDMM Cable 09)	\$	6,800
	2008 FAIN	\$	4,826
8/15/2009	2008 TAIN	\$	(7,111)
	Net Private (TDMV08R)	\$	21,081
9/15/2009	Net Private (TDMVER11-9.00)	\$	8,470
9/15/2009	2008 FAIN	\$	4,826

**Date** 

**Description per Payroll Records** 

9/15/2009 2008 TAIN

\$ 0,111

**TOTAL** 

\$ 1,775,544

Circled entries = \$167,451.00

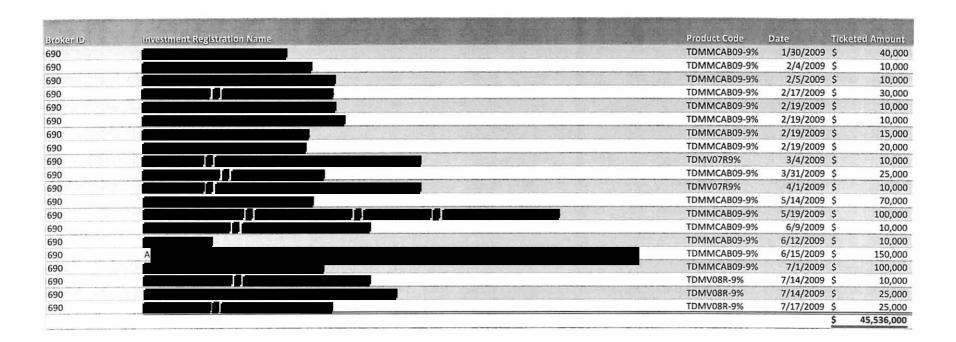
# EXHIBIT "C"

#### WILLIAM F. LEX SUMMARY OF SALES

Broker ID	Investment Registration Name	Product Code	Date	Tickete	d Amount
90	TOTAL BIOURN THE DIGUEN AND THE DEDUCTION TRUCT	TDMVER18	1/15/2008		50,000
90		TDMVER18	1/15/2008		100,000
90		FAIN 7%08	1/16/2008		12,000
90		TAIN7.75%09	1/16/2008		10,000
90		FIRSTLN9.5B	1/18/2008	\$	55,000
90		FIRSTLN9.5B	1/22/2008	\$	10,000
90		FIRSTLN9.5B	1/31/2008	\$	10,000
90		FIRSTLN9.5B	1/31/2008		30,000
90		FIRSTLN9.5B	2/4/2008	\$	30,000
90		TDMVER18	2/4/2008		50,000
90		TAIN 7%08	2/6/2008		20,000
590		TAIN 7%08	2/7/2008		10,000
590		FEIN 7%09	2/11/2008	-	15,000
590		TDMVER36	2/19/2008		150,000
90		TDMVER07R	2/20/2008	-	10,000
590		TDMVER07R	2/20/2008		10,000
90		TDMVER07R	2/20/2008		10,000
590		TDMVER07R	2/20/2008		70,000
90		FEIN 7%09	2/27/2008		15,000
590		TDMVER07R	2/27/2008	VI.0.	15,000
590		TDMVER18	2/29/2008		100,000
590		TDMVER18	3/6/2008		The second secon
590		- TDMVER07R	3/17/2008		25,000
590		TDMVER07R	3/17/2008		90,000
A CORP. A SEC. LABOR.		FEIN 7%09	3/18/2008		90,000
590 590		FIIN 7%09	3/18/2008	to be seen as the same	80,000
		TDMVER07R	The second second second		80,000
590			3/18/2008	12	20,000
590		TDMVER36 TDMVER36	3/18/2008	The second secon	80,000
590		The state of the s	3/20/2008		25,000
590		TDMVER07R	3/24/2008	-	27,500
590		TDMVER36	4/2/2008		25,000
590		TDMVER07R	4/8/2008		25,000
7		TDMVER07R	4/21/2008		25,000
690		TDMVER18	4/24/2008	_	10,000
590		FIRSTLN11B	5/29/2008		10,000
690		INEX9%	6/9/2008	-	107,500
690		INEX9%	6/9/2008		107,500
7	No. of the control of	INEX9%	6/13/2008		42,500
590	1075 E.	INEX9%	6/17/2008	Name of the last	10,000
690		INEX9%	6/17/2008		25,000
7		INEX9%	6/17/2008		22,500
690		INEX9%	6/26/2008		50,000
690		INEX9%	6/26/2008	\$	10,000
690		INEX9%	6/26/2008	\$	10,000

#### WILLIAM F. LEX SUMMARY OF SALES

Broker ID	Investment Registration Name	Product Code Date	Ticket	ted Amount
590		INEX9% 6/26/200		10,000
590		INEX9% 6/26/200		20,000
90		INEX9% 6/26/200	8 \$	10,000
590		INEX9% 6/26/200	8 \$	75,000
590		INEX9% 6/30/200		10,000
590		INEX9% 7/2/200		10,000
690		INEX9% 7/2/200	8 \$	10,000
690		INEX9% 7/7/200	8 \$	15,000
690		INEX9% 7/8/200		30,000
690		INEX9% 7/11/200		15,000
690		INEX9% 7/16/200		15,000
690		INEX9% 7/16/200		15,000
690		INEX9% 7/16/200	-	70,000
690		INEX9% 7/16/200		15,000
690		INEX9% 7/24/200		10,000
690		FORT13% 9/29/200		40,000
690		FORT13% 9/30/200		10,000
690		FORT13% 9/30/200		10,000
690		FORT13% 9/30/200		200,000
690		FORT13% 9/30/200		10,000
690		FORT13% 10/1/200		10,000
690		FORT13% 10/1/200	and the same	10,000
690		FORT13% 10/1/200		10,000
690		TDMVER24 11/21/200		30,000
690		TDMVER18 11/21/200		50,000
690		FORT13% 12/19/200		25,000
690		FORT13% 12/19/200		50,000
690		FORT13% 12/19/200		30,000
690		FORT13% 12/19/200		45,000
690		TDMVER0910% 1/5/200		10,000
690		TDMVER0910% 1/5/200	-	15,000
690		TDMVER0910% 1/5/200		20,000
690		TDMVER0910% 1/5/200		35,000
690		FORT13% 1/6/200	The second second	50,000
690		TDMVER0910% 1/7/200		10,000
690		TDMVER0910% 1/7/200		35,000
690		TDMVER0910% 1/8/200		5,000
690		TDMVER0910% 1/8/200		15,000
690		TDMVER0910% 1/12/200		50,000
		TDMMCAB09-9% 1/26/200		
690		TDMVER0910% 1/27/200	-	10,000
690				10,000
690				100,000
690		TDMMCAB09-9% 1/29/200		10,000
690		TDMMCAB09-9% 1/29/200	9 \$	10,000

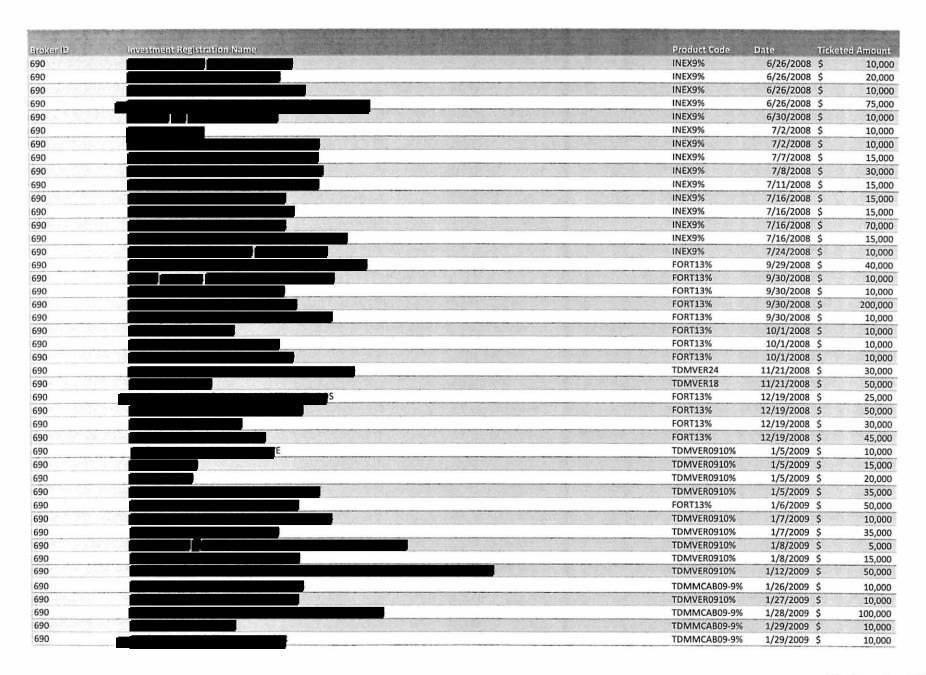


# EXHIBIT "D"



Sales = \$220,000 Commissions at .8% = \$1760.00

#### WILLIAM F. LEX SUMMARY OF SALES



Broker ID	Investment Registration Name	Product Code	Date	Ticketed Amoun
690		TDMMCAB09-9%	1/30/2009	\$ 40,0
690		TDMMCAB09-9%	2/4/2009	\$ 10,0
690		TDMMCAB09-9%	2/5/2009	\$ 10,0
690		TDMMCAB09-9%	2/17/2009	\$ 30,0
690		TDMMCAB09-9%	2/19/2009	\$ 10,0
690		TDMMCAB09-9%	2/19/2009	\$ 10,0
690	Russesses in the control of the cont	TDMMCAB09-9%	2/19/2009	\$ 15,0
690		TDMMCAB09-9%	2/19/2009	\$ 20,0
690		TDMV07R9%	3/4/2009	\$ 10,0
690		TDMMCAB09-9%	3/31/2009	\$ 25,0
690		TDMV07R9%	4/1/2009	\$ 10,0
690		TDMMCAB09-9%	5/14/2009	\$ 70,0
690		TDMMCAB09-9%	5/19/2009	\$ 100,0
690		TDMMCAB09-9%	6/9/2009	\$ 10,0
690		TDMMCAB09-9%	6/12/2009	\$ 10,0
690		TDMMCAB09-9%	6/15/2009	\$ 150,0
690		TDMMCAB09-9%	7/1/2009	\$ 100,0
690		TDMV08R-9%	7/14/2009	\$ 10,0
690		TDMV08R-9%	7/14/2009	\$ 25,0
690	л	TDMV08R-9%	7/17/2009	\$ 25,0
				\$ 45,536,0

# EXHIBIT "E"

Direct/Lex going after them, these customers, or had these customers come to you, or was it a combination of the two?  A. Can I make a quelification? A. Can I make a quelification? A. I can't prove it, your Honor, but the sense that don't have check marks, they may very well have this elarm notes. I just didn't put them down because their records were so old, they got stredded, and I wasn't going to check something that I couldn't prove. Anyway, it could have been 100 percent, but anyway, it could have been 100 percent, but anyway, it could customer hadn't owned alarm notes before 2003, dher product with you or obtain any other product diff you before 2003?  A. Yes. They had to be. They were all all existing clients.  C. What kind of products might they notes?  A. Looking at this, variable  Page 4865  Direct/Lex annutities, disability, life insurance, couple here had malpractice insurance. A. Yes. Ryan Rogers.  A. I wanted my clients to have the sent or and senior subordinated, were you here when Mr. Rogers expressed?  A. I wanted my clients to have the best level of protection at maturity and/or liquidated.  I misulation.  I mean, granted we all know there is risk in these things, but, boy, in my heart I thought — and I didn't use this as a terminotogy.  but this is why I bought them my yeef. I thought it it is next to impossible not to get 25 cents on the dollar.  I guidated.  I mean, granted we all know the list is next to impossible not to get 25 cents on the dollar.  It is next to impossible not to get 25 cents on the dollar.  10 going on. I mean, even poor Investments should be worth 25 cents on the dollar.  11 guidated the serving them my yeef. I thought the twest yie bought them my yeef. I thought the dollar, with the dollar my of the court of the dollar.  12 down the fore and senior subordinated was 50  13 down the fore 2003?  A. Yes. They had to be. They were  14 percent on the seniors. What p	<u> </u>	Page 4864	<u> </u>	Page 4866
going after them, these customers, or had these customers come to you, or was it a combination of the two?  A. Can I make a qualification?  A. I can't prove it, your Honor, but the ones that don't have check marks, they may very well have this elarm notes. I just ddn't put them down because their records were so old, they got stredded, and I wasn't going to check something that I could'th prove. Anyway, it could have been 100 percent, but anyway.  4. Q. If you looked at these, if the soutomer hadn't owned alarm notes before 2003, they were any of these customers on the first pages we provided with you or obtain any other product with you before 2003?  A. Yes. They had to be. They were all existing clients.  A. Yes. They had to be. They were all existing clients.  A. Yes. They had to be. They were all existing clients.  Page 4865  Direct/Lex annuties, disability, life insurance, couple here had matpractice insurance.  A. Yes. Ryan Rogers.  A. Yes. Ryan Rogers expressed?  A. Yes. Ryan Rogers express	1	_	1	-
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7 A. I can't prove it, your Honor, but 8 the ones that don't have check marks, they may 9 very well have this learm notes. I just didn't 10 put them down because their records were so old, 11 they got stredded, and I wasn't going to check 22 something that I couldn't prove. Anyway, it could 13 have been 100 percent, but arryway. 14 Q. If you looked at these, if the 15 customer hadn't owned alarm notes before 2003, 16 were arry of these customers on the first pages we 17 put as part of Exhibit 154? Did they own any 19 other product with you or obtain any other product 19 with you before 2003? 20 A. Yes. They had to be. They were 21 all existing clients. 22 Q. What kind of products might they 23 have owned prior to 2003 if they didn't own alarm 24 notes? 25 A. Looking at this, variable  Page 4865  1 Direct/Lex 2 annutities, disability, life insurance, couple here 3 had malpractice insurance. 4 Q. The reasons for your selling only 5 senior and senior subordinated, were you here when 6 Mr. Rogers testified? 7 A. Yes. Ryan Rogers. 8 Q. Were the reasons frot your selling only 5 senior and senior subordinated similar to the 6 mr. Rogers testified? 7 A. Yes. Ryan Rogers. 8 Q. Were the reasons for your selling only 5 senior and senior subordinated similar to the 6 mr. Rogers testified? 10 reasons Mr. Rogers expressed? 11 A. I think he did a pretty good job. 12 MR. STOELTING: Objection. 13 Q. What were the reasons you only sold 14 senior and senior subordinated? 15 A. I user the measons were you here when 16 best level of protection at maturity and/or 17 I quidation. 18 Q. And the senior note was explained 29 as whar? 20 A. The senior note was explained 21 this is why I bought them myself. I thought in which to led it are next to sep 250 cents on the dollar. 22 the differential senior be going on. I mean, even poor Investments should by solid ground having senior notes to say without fraud going on. I mean, yeven poor Investments should by solid ground having senior notes. 24 Q. While I think of it, I believe there has b	1		1	-
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the dollar, egain, we have to say without fraud going on. I mean, even poor investments should be worth 25 cents on the dollar.  13 have been 100 percent, but anyway.  14 Q. If you looked at these, if the count of the dollar, egain, we have to say without fraud going on. I mean, even poor investments should be worth 25 cents on the dollar.  15 customer hadn't owned alarm notes before 2003, were any of these customers on the first pages we put as part of Exhibit 1547 Did they own any of the product with you or obtain any other product with you before 2003?  20 A. Yes. They had to be. They were all existing clients.  21 all existing clients.  22 Q. What kind of products might they have owned prior to 2003 if they didn't own alarm notes?  24 A. Looking at this, variable  Page 4865  Direct/Lex annutities, disability, life insurance, couple here had malpractice insurance.  A. Yes. Ryan Rogers.  Q. The reasons for your selling only senior and senior subordinated, were you here when Mr. Rogers expressed?  A. Yes. Ryan Rogers.  Q. What the reasons that you only sold senior and senior subordinated similar to the reasons Mr. Rogers expressed?  A. Yes. Ryan Rogers.  Q. What were the reasons that you only sold senior and senior subordinated similar to the reasons Mr. Rogers expressed?  A. Yes. Ryan Rogers.  Q. What were the reasons you only sold senior and senior subordinated similar to the reason Mr. Rogers expressed?  A. Yes. Ryan Rogers.  Q. What were the reasons you only sold senior and senior subordinated similar to the sest level of protection at maturity and/or liquidation.  A. I wanted my clients to have the best level of protection at maturity and/or liquidation.  A. The senior note was sirst in line at a – in other words, we never got to the point at a – in other words, we never got to the point at a – in other words, we never got to the point at a – in other words, we never got to the point at a – in other words, we never got to the point at a – in other words, we never got to the point at a – in other words, we	1			
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12 something that I couldn't prove. Anyway, it could have been 100 percent, but anyway.  14 Q. If you looked at these, if the customer hadn't owned alarm notes before 2003, were any of these customers on the first pages we product with you or obtain any other product with you or obtain any other product with you before 2003?  16 were any of these customers on the first pages we product with you or obtain any other product with you or obtain any other product with you before 2003?  20 A. Yes. They had to be. They were all existing clients.  21 all existing clients.  22 Q. What kind of products might they have owned prior to 2003 if they didn't own alarm notes?  23 had malpractice insurance.  24 annutities, disability, life insurance, couple here a had malpractice insurance.  3 had malpractice insurance.  4 Q. The reasons for your selling only senior and senior subordinated, were you here when Mr. Rogers testified?  5 A. Yes. Ryan Rogers.  9 Q. What were the reasons that you only sold senior and senior subordinated similar to the reasons Mr. Rogers expressed?  11 A. I think he did a pretty good job.  12 MR. STOELTINIG: Objection.  13 Q. What were the reasons you only sold senior and senior subordinated?  14 A. I wanted my clients to have the best level of protection at maturity and/or liquidation.  15 Jupice Murch and the product was 50 cents on the dollar?  16 hought — I thought my clients were on pretty sold ground having senior subordinated was 50 cents on the dollar?  18 A. Ves.  Q. While I think of it, I believe there has been testimony about commissions at 1 percent so I got 80 percent, your Honor, at — Q. There has been testimony — 1 percent so I got 80 percent, your Honor, at — Q. There has been testimony — 1 percent so I got 80 percent, your Honor, at — 1 percent so I got 80 percent, your Honor, at — 1 percent so I got 80 percent, your Honor, at — 1 percent so I got 80 percent, your Honor, at — 1 percent so I got 80 percent, your Honor, at — 1 percent so I got 80 percent, your Honor, at 1 percent so I go	1	•		·
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1	21		1	•
I as a substitution of the second state of the second and the seco	22		1	
	23	described was supposed to liquidate in 2008. If	23	Q. With respect to the senior
1	l .	•	1	subordinated notes, what was your commission?
25 were sitting in 2008, if the assets were 25 A. That was well, it was 80 percent	25	were sitting in 2008, if the assets were	25	A. That was well, it was 80 percent

	Page 4868		Page 4870
1	Direct/Lex	1	Direct/Lex
2	of 2 percent which would have been 1.6 percent.	2	high demand from people who were just, you know,
3	Q. Again, you had all the expenses	3	as comfortable, as comfortable could be with a
4	yourself; is that correct?	4	McGinn Smith product and -
5	A. Yes.	5	Q. Based on what?
6	I might add, that rate was whether	6	A. Based on three, four, five, six
7	I sold one thing or 100. It wasn't any	7	years of payments and redemptions and whatever.
8	differential in volume.	8	Again, I never thought about how,
9	Q. So there were no bonuses given by	9	you know, so many people signed up so fast, but it
10	McGinn Smith for volume or special trips	10	was a case that I had people saying "Promise me
11	somewhere, anything like that?	11	the next time an offering is available." I mean,
12	A. Not to me.	12	it is a nice position to be in, but that was very
13	JUDGE MURRAY: You didn't get a	13	frequent.
14	ticket for that dinner?	14	Q. What I am trying to find out is
15	THE WITNESS: I got one dinner	15	when you would present, let's say, a variable
16	a year, your Honor. I stand corrected, but I	16	annuity or fixed annuity at the same time you
17	had to pay my way to Albany for that. Sorry.	17	would present a McGinn Smith note - did that
18	Q. And the commission on the senior	18	happen, by the way?
19	subordinateds, would you get a commission each	19	A. Oh, yes, yes.
20	year if it was a 3-year note?	20	Q. And a mutual fund at the same time?
21	A. Yes, you would.	21	A. Yes. We didn't talk about mutual
22	Q. So it looks like there is about a	22	funds that often because my clients like variable
23	25 percent - 2 percent - a 25 percent	23	annuities versus a mutual fund. Even though it
24	differential between what they were paying the	24	was a little more expense, people liked the idea,
25	other brokers and you by virtue of the fact that	25	you bought a variable annuity. Your beneficiary
	Page 4869		Page 4871
1	Direct/Lex	1	Direct/Lex
2	you had your own expenses; is that correct?	2	got the greater, what they put in or what it was
3	A. Yes. I will never figure it out,	3	worth.
4	but that sounds right.	4	Believe me, if you died in 2008,
5	Q. I want to go back to when you	5	your family was very happy you had a variable
6	presented these notes, the Four Fund notes, I	6	annuity.
7	would like to know what you presented, whether you	7	Q. Would you explain the relative
8	presented one product or more than one product	8	risks of the variable annuity as opposed to the
9	when you presented these notes.	9	private placement in one of the Four Funds when
10	A. Well, I mean, each situation was	10	you would make the presentation?
11	different, and I had, I mean, continuing I	11	A. Sure. I mean, even with a variable
12	mean, flow of conversations with my clients.	12	annuity, for example, a variable annuity, if I am
13 14	All products were discussed from time to time. I mean, I would say, you know, the	13 14	talking to somebody a variable annuity, a lot of times people would say "What if that company goes
i .	•	15	bankrupt?"
15 16	main competing products to these private placements would have been whether somebody wanted	16	I would say "Actually, if a
17	a fixed or variable annuity or a corporate bond.	17	variable annuity company goes bankrupt, there is
18	I mean, just from the standpoint –	18	really not much risk. It is more of an
19	I mean, leaving risk out of it for a minute,	19	Inconvenience because with the insurance
20	ignoring risk but just saying what were people	20	department's insolvency funds" - like if
21	considering, you know, as an alternative to this.	21	Prudential went bankrupt, Metropolitan would
22	Q. So you would present, offer more	22	probably take over, but the people's assets aren't
23	than one product to the customer?	23	with Metropolitan, they are with all these sub
24	A. Yes. I mean, every - I mean, I	24	funds.
	think what this list shows is that there was a	25	So the risk of a variable annuity

# EXHIBIT "F"

# Award FINRA Dispute Resolution

In the Matter of the Arbitration Between:

Duckkyu Chang, Kee Chang, and Duckkyu Chang TTEE Cumberland Pathology Associates, LLC (Claimants) vs. McGinn, Smith & Co., Inc., Timothy M. McGinn, David L. Smith, Thomas E. Livingston, Lex & Smith Associates Ltd., William F. Lex, McGinn Smith Advisors, LLC, and McGinn, Smith Capital Holdings Corp. (Respondents)

Case Number: 08-04924

Hearing Site: Philadelphia, Pennsylvania

Nature of the Dispute: Customers vs. Member. Associated Persons, and Non-Members.

#### REPRESENTATION OF PARTIES

Claimants Duckkyu Chang ("D. Chang"), Kee Chang ("K. Chang"), and Duckkyu Chang TTEE Cumberland Pathology Associates, LLC ("Cumberland"), hereinafter collectively referred to as "Claimants": Jenice L. Malecki, Esq., Malecki Law, New York, NY.

Respondents McGinn, Smith & Co., Inc. ("MS & Co."), Timothy M. McGinn ("McGinn"), David L. Smith ("Smith"), Thomas E. Livingston ("Livingston"), Lex & Smith Associates Ltd. ("Lex & Smith"), William F. Lex ("Lex"), McGinn, Smith Advisors, LLC ("MS Advisors"), and McGinn, Smith Capital Holdings Corp. ("MS Capital"), hereinafter collectively referred to as "Respondents": David C. Franceski, Jr., Esq., Stradley, Ronon, Stevens & Young, LLP, Philadelphia, PA. Previously represented by Christine M. Debevec, Esq., Stradley Ronon Stevens & Young, LLP, Philadelphia, PA.

#### CASE INFORMATION

Statement of Claim filed on or about: December 22, 2008.

D. Chang signed the Uniform Submission Agreement: December 16, 2008.

K. Chang signed the Uniform Submission Agreement: December 16, 2008.

Cumberland signed the Uniform Submission Agreement: December 16, 2008.

Joint Statement of Answer filed by Respondents MS & Co., Smith, and Lex on or about: March 12, 2009.

MS & Co. signed the Uniform Submission Agreement: March 12, 2009. Smith signed the Uniform Submission Agreement: March 12, 2009.

Lex signed the Uniform Submission Agreement: March 12, 2009.

McGinn did not file an Answer.

McGinn signed the Uniform Submission Agreement: August 4, 2009.

Livingston did not file an Answer.

Livingston signed the Uniform Submission Agreement: August 5, 2009.

FiNRA Dispute Resolution Arbitration No. 08-04924 Award Page 2 of 9

Lex & Smith did not file an Answer or sign the Uniform Submission Agreement.

MS Advisors did not file an Answer or sign the Uniform Submission Agreement.

MS Capital did not file an Answer or sign the Uniform Submission Agreement.

### **CASE SUMMARY**

Claimants asserted the following causes of action: unsuitable investments, negligence, negligent supervision, breach of contract, violations of industry rules, failure to diversify, respondeat superior, breach of fiduciary duty, fraud, misrepresentations, and omissions. The causes of action relate to unspecified private placement products, notes, and trusts.

Unless specifically admitted in their Answer, Respondents MS & Co., Smith, and Lex denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

#### **RELIEF REQUESTED**

In the Statement of Claim, Claimants requested compensatory damages in the amount of \$2,577,000.00, commissions, interest, attorneys' fees, costs, and punitive damages.

Respondents MS & Co., Smith, and Lex requested Claimants' claims be denied in their entirety.

# OTHER ISSUES CONSIDERED AND DECIDED

The Panel acknowledges that they have each read the pleadings and other materials filed by the parties.

Respondents Lex & Smith, MS Advisors, and MS Capital are not members or associated persons of FINRA and did not voluntarily submit to arbitration. Therefore, the Panel made no determination with respect to Claimants' claims against Respondents Lex & Smith, MS Advisors, and MS Capital.

On or about June 30, 2009, Claimants filed a Motion in Support for Default Judgment against Respondents Timothy M. McGinn and Thomas E. Livingston. On or about July 10, 2009, Respondents filed an Opposition to Claimants' Motion. On August 4, 2009 a pre-hearing conference was conducted to address the Motion and the Panel, having considered the submissions and oral arguments of the parties and after due deliberation, denied the Motion.

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

### **ARBITRATORS' FINDINGS**

The arbitrators have provided an explanation of their decision in this Award, the explanation is for the information of the parties only and is not precedential in nature.

FINRA Dispute Resolution Arbitration No. 08-04924 Award Page 3 of 9

Dr. Chang and his wife as individuals and Dr. Chang in his role as trustee of Cumberland Pathology pension accounts appear to be intelligent, accomplished people. However, the Arbitration Panel finds no logical carryover from being very experienced at the practice of medicine or music theory or the use of Quicken software programs to account for small-business accounts receivable and accounts payable to any understanding of private placement prospectus.

Furthermore, Mr. Lex seems to be a conscientious broker and insurance salesman who is congenial. McGinn, Smith & Company as the supervisor of Mr. Lex had necessary procedures and policies in place to carry out its duties to potential customers as they had standard education programs for brokers and industry-standard supervision procedures for individual broker accounts.

The Panel has come to a unanimous decision that there is some definitive fault by Dr. Chang and some fault by three of the Respondents - Mr. Lex, Mr. David Smith, and McGinn, Smith & Co. As a preface to this decision, the Panel finds there was no role by the two individuals - Mr. Thomas Livingston or Mr. McGinn. However, in light of this finding being joint and several, and, in light of McGinn, Smith & Co. being liable, it is entirely a matter of the contractual ownership and employment relationship between either Mr. Livingston or Mr. McGinn and McGinn, Smith & Co. as to any contribution these two gentlemen may owe McGinn, Smith & Co. At the risk of being redundant, this arbitration decision does not affect any contractual responsibility Mr. Livingston and Mr. McGinn may have, if any, to reimburse McGinn, Smith & Co. for damages McGinn. Smith & Co. ultimately provides the Claimants. Furthermore, while neither party requested any expungement action by the Panel, after a review of the entire record, which included direct and cross-examination of Mr. Livingston and Mr. McGinn, on its own initiative, the Panel unanimously finds, as a matter of justice and equity, that any mention of this claim, including all allegations originating from this claim, be stricken from all FINRA records and those records FINRA may advise upon concerning both Mr. Thomas Livingston and Mr. McGlnn.

The quantitative reasoning and reason for the assignment of fault is set out immediately below.

Dr. Chang and Kee Mann Chang are found to be responsible for the consequences of their own investment decisions after their stating repeatedly verbally and in writing that they had the opportunity to read investment literature and query resources such as Mr. Lex about the risks and rewards of the subject private placement notes.

The fault of Mr. Lex, Mr. Smith, and McGinn, Smith & Company is derived from the overconcentration of the Claimants' investments in these private placement notes. While Mr. Lex is certainly not responsible for preventing the Claimants from investing all of their funds into a single instrument, Mr. Lex and McGinn, Smith & Co. through Mr. David Smith [because Mr. David Smith oversaw Mr. Lex as the compliance officer for a large majority of the time period in question] could have just told Dr. Chang and Kee Mann Chang that McGinn, Smith & Co. would not play a part in these disproportionate investment actions as they developed. Mr. Lex and/or McGinn, Smith & Co. could have declined to conduct the sale of any more of these notes once the over-concentration

FINRA Dispute Resolution Arbitration No. 08-04924 Award Page 4 of 9

reached a critical mass.

As to some counter-arguments presented to the arbitration Panel, the Panel finds the line of reasoning that these private placement notes were both diversified within each note, and the five or more notes were separately varied so there was not concentration. to be disingenuous. There are about a dozen or maybe two dozen small to moderately capitalized LLCs within these notes that are all either consumer service companies like residential alarm companies or discretionary-consumer goods companies like swimming pool supply firms or golf club accessory supply firms. A truly diversified portfolio would have some selections of small, mid and large capitalized businesses among the number of business areas such as some greater number of the 98 categories of businesses that Value Line created. Another counterpoint raised in the arbitration hearing with colored "pie-charts" depicting the percentage of the Chang's assets that were invested in these private placements, was that the Respondents concluded that the subject private placement notes were only 40 to 60% of the Claimants' total assets; this statement by the Respondents rings hollow. Of the liquid or near liquid assets Dr. Chang and Kee Mann Chang had, these subject notes were close to 90% of their net worth, and this aspect of the over-concentration is exacerbated by Mr. Lex only knowing a fraction of Dr. Chang's and Kee Mann Chang's total liquid/near liquid assets.

As to one other counterpoint raised by the Respondents in this case, the Panel finds that the Respondents' argument, that rescission is impossible because the "wrong" parties were sued, to be a fiction. Even while the Respondents referenced briefly and vaguely to regulatory prohibitions at the end of the Arbitration Hearing, this Panel finds that it is within regulatory parameters for Mr. Lex and/or Mr. David Smith to own the notes as individuals if McGinn, Smith & Co. believes it cannot do so. As a result of the Panel's award being joint and several, McGinn, Smith & Co. could compensate Mr. Lex and/or Mr. David Smith if McGinn, Smith & Co. chose to do so in the possible ownership interest in the subject notes ordered here to be returned by the Claimants.

In determining the Award of \$805,110.00, the Arbitration Panel has accounted for in a partial rescission of the purchase of the subject notes: (1) the interest earned by the notes while the Claimants actually held these notes, (2) an imputed interest the Claimants would have conservatively earned with the \$805,110.00 if they had never purchased some of these notes, and (3) there is no purposeful assault on the public good by the Respondents so NO punitive damages are awarded.

#### **AWARD**

After considering the pleadings, the testimony and evidence presented at the hearing, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

- 1. Respondents McGinn, Smith & Co., Inc., William Lex, and David Smith are jointly and severally liable for and shall pay to Claimants \$805,110.00 in compensatory damages. Concurrently Dr. Chang, Kee Mann Chang, and Cumberland Pathology Associates are to provide ownership rights to the Respondents of 45% of the face value of the initial value of private placement notes as defined below.
  - a. Payment of \$805,110.00 shall be made within 30 days of the issuance

- of this Award, and any amount paid after 30 days from the Award issuance date will be subject to post-judgment interest of 6% per Pennsylvania statutes.
- b. Concurrently with the payment of the full amount of funds to the Claimants in the amount of \$805,110.00, the Claimants shall sign over to the specific Respondent party(s) [designated before hand by the Respondents] all ownership rights the Claimants have to 45% of the face value of the "notes" to the Respondents [the particular private placement notes will be chosen by the Claimants].
- c. The 45% shall be that percentage of the face value [initial purchase value before commissions are deducted] of the total subject "notes" value when initially purchased by the Claimants.
- d. The universe of these "notes" are defined as: all FEIN, FIIN, TAIN, notes held by Dr. Chang on December 11, 2009; and all FAIN, FIRST LINE, INEX notes held by Dr. Chang's IRA as of December 11, 2009; and all FIIN, FAIN, FEIN notes held by Kee Mann Chang as of December 11, 2009; and all INEX and FAIN notes held by Cumberland Pathology Associates, LLC as of December 11, 2009.
- e. In addition, if any interest/return of principal of the universe of notes as set out above occurs from the date of this Award until the funds are actually received by the Claimants, then the amount of the interest/return of principal shall also be returned to the Respondents immediately.
- 2. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Timothy M. McGinn's (CRD #813935) registration records maintained by the Central Registration Depository ("CRD"), with the understanding that pursuant to Notice to Members 04-16, Respondent Timothy M. McGinn must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

Unless specifically waived in writing by FINRA, parties seeking judicial confirmation of an arbitration award containing expungement relief must name FINRA as an additional party and serve FINRA with all appropriate documents.

Pursuant to the Rule 12805 of the Code, the arbitration panel has made the following Rule 2080 affirmative findings of fact:

The registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds.

The arbitration panel has made the above Rule 2080 finding based on the following reasons:

The Panel has come to a unanimous decision that there is some definitive fault by Dr. Chang and some fault by three of the Respondents - Mr. Lex, Mr. David Smith, and McGinn, Smith & Co. As a preface to this decision, the Panel finds there was no role by the two individuals - Mr. Thomas Livingston or Mr. McGinn. However, in light of this finding being joint and several, and, in light of McGinn,

Smith & Co. being liable, it is entirely a matter of the contractual ownership and employment relationship between either Mr. Livingston or Mr. McGinn and McGinn, Smith & Co. as to any contribution these two gentlemen may owe McGinn, Smith & Co. Furthermore, while neither party requested any expungement action by the Panel, after a review of the entire record, which included direct and cross-examination of Mr. Livingston and Mr. McGinn, on its own initiative, the Panel unanimously finds, as a matter of justice and equity, that any mention of this claim, including all allegations originating from this claim, be stricken from all FINRA records and those records FINRA may advise upon concerning both Mr. Thomas Livingston and Mr. McGinn.

3. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Thomas E. Livingston's (CRD #864264) registration records maintained by the Central Registration Depository ("CRD"), with the understanding that pursuant to Notice to Members 04-16, Respondent Thomas E. Livingston must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

Unless specifically waived in writing by FINRA, parties seeking judicial confirmation of an arbitration award containing expungement relief must name FINRA as an additional party and serve FINRA with all appropriate documents.

Pursuant to the Rule 12805 of the Code, the arbitration panel has made the following Rule 2080 affirmative findings of fact:

The registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds.

The arbitration panel has made the above Rule 2080 finding based on the following reasons:

The Panel has come to a unanimous decision that there is some definitive fault by Dr. Chang and some fault by three of the Respondents - Mr. Lex, Mr. David Smith, and McGinn, Smith & Co. As a preface to this decision, the Panel finds there was no role by the two individuals - Mr. Thomas Livingston or Mr. McGinn. However, in light of this finding being joint and several, and, in light of McGinn, Smith & Co. being liable, it is entirely a matter of the contractual ownership and employment relationship between either Mr. Livingston or Mr. McGinn and McGinn, Smith & Co. as to any contribution these two gentlemen may owe McGinn, Smith & Co. Furthermore, while neither party requested any expungement action by the Panel, after a review of the entire record, which included direct and cross-examination of Mr. Livingston and Mr. McGinn, on its own initiative, the Panel unanimously finds, as a matter of justice and equity, that any mention of this claim, including all allegations originating from this claim, be stricken from all FINRA records and those records FINRA may advise upon concerning both Mr. Thomas Livingston and Mr. McGinn.

4. Any and all relief not specifically addressed herein, including punitive damages, is denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### Filing Fees

FINRA Dispute Resolution assessed a filing fee\* for each claim: Initial claim filing fee

= \$1.800.00

#### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated persons at the time of the events giving rise to the dispute. Accordingly, as a party, McGinn, Smith & Co., Inc., is assessed the following:

Member surcharge	= \$2,800.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$5,000.00

#### Hearing Session Fees and Assessments

The Panel has assessed hearing session fees for each session conducted. A session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with a single arbitrator @ \$450.00			= \$ 450.00
Pre-hearing conference:	August 11, 2009	1 session	
Three (3) Pre-hearing sessions with Panel @ \$1,200.00			= \$3,600.00
Pre-hearing conferences:	May 4, 2009	1 session	
	August 4, 2009	1 session	
	September 10, 2009	1 session	
Twenty (20) Hearing sessions @ \$1,200.00			= \$24,000.00
Hearing Dates:	October 12, 2009	2 sessions	
	October 13, 2009	2 sessions	
	October 14, 2009	2 sessions	
	October 15, 2009	2 sessions	
	October 16, 2009	2 sessions	
	October 19, 2009	2 sessions	
	October 20, 2009	2 sessions	
	December 8, 2009	2 sessions	
	December 10, 2009	2 sessions	
	December 11, 2009	2 sessions	
Total Hearing Session Fees			= \$28,050.00

1. The Panel has assessed \$14,025.00 of the hearing session fees jointly and severally to Claimants.

<sup>\*</sup>The filing fee is made up of a non-refundable and a refundable portion.

FINRA Dispute Resolution Arbitration No. 08-04924 Award Page 8 of 9

2. The Panel has assessed \$14,025.00 of the hearing session fees jointly and severally to Respondents McGinn, Smith & Co., Inc., William F. Lex, and David L. Smith.

All balances are payable to FINRA Dispute Resolution and are due upon receipt.

FinRA Dispute Resolution Arbitration No. 08-04824 Award Page 9 of 9

## ARBITRATION PANEL

Thomas B. Salzer - Public Arbitrator, Presiding Chairperson Edward Greer - Public Arbitrator

Kenneth J. Beahan - Non-Public Arbitrator

Concurring Arbitrators' Signatures

Thomas El Salzes Signature Date

Public Arbitrator, Presiding Chairperson

Edward Greer Signature Date
Public Arbitrator

Kenneth J. Beahan
Non-Public Arbitrator

December 31, 2009

Date of Service (For FINRA Dispute Resolution use only)

-PARA Dispute Resolution Arbitration No. 06-04824 Award Page 9 of 9

## ARBITRATION PANEL

Thomas B. Seizer

Public Arbitrator, Presiding Chairperson

Edward Greer

Public Arbitrator

Kenneth J. Bachen Non-Public Arbitrator

# Contraction Arbitrators' Signatures

Thomas B. Salzer

Public Arbitrator, Presiding Chairpesson

Signature Date

Konneth J. Beahan Non-Public Arbitrator

Signature Date

December 31, 2009
Data of Sarvice (For FINRA Dispute Resolution use only)

FINITA Disputs Resolution Arbitration No. 08-04824 Award Page 9 of 9

# ARBITRATION PANEL

Thomas B. Seizer

Public Arbitrator, Presiding Chairperson

**Edward Greer** Kenneth J. Beehan Public Arbitrator Non-Public Arbitrator

## Concurring Arbitrators' Signatures

Thames B. Seizer Public Arbitrator, Presiding Chairperson Signature Date

**Edward Greer** Public Arbitrator Signature Date

Non-Public Arbitrator

December 31, 2009
Dete of Service (For FINRA Dispute Resolution use only)

# UNITED STATES OF AMERICA Before the SECURITIES AND EXCHANGE COMMISSION

# **ADMINISTRATIVE PROCEEDING**File No. 3-15514

In the Matter of

DONALD J. ANTHONY, JR.,
FRANK H. CHIAPPONE,
RICHARD D. FELDMANN,
WILLIAM P. GAMELLO,
ANDREW G. GUZZETTI,
WILLIAM F. LEX,
THOMAS E. LIVINGSTON,
BRIAN T. MAYER,
PHILIP S. RABINOVICH, and
RYAN C. ROGERS.

\_\_\_\_\_

### **CERTIFICATE OF SERVICE**

I hereby certify that on the date set forth below, I served copies of the foregoing pleading on the following persons via e-mail and 1<sup>st</sup> class mail, postage prepaid, addressed as follows:

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Haimavathi V. Marlier, Esquire
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Hon. Brenda P. Murray
Chief Administrative Law Judge
Securities and Exchange Commission
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DATE: 3-6-15

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